IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-921

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION,
a Minnesota nonprofit corporation,
and AMHERST H. WILDER FOUNDATION,
a Minnesota nonprofit corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS AND SUPPORTING BRIEF

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Appellees.

On Appeal From the Supreme Court
of Minnesota

MOTION TO DISMISS

Appellees Rarig, Minnesota Foundation and Amherst H. Wilder Foundation hereby move, pursuant to Rule 16(1)(b) of the Rules of this Court, to dismiss the appeal on the grounds that the questions presented in the Jurisdictional Statement were not properly raised nor expressly passed on, that the decision of the Minnesota Supreme Court below rests entirely upon adequate and independent

nonfederal grounds and represents simply the resolution of a question of fact and that the questions presented are so unsubstantial as not to warrant further argument.

BRIEF IN SUPPORT OF MOTION
QUESTIONS PRESENTED

1. Did the Appellant properly present, and did the Minnesota Supreme Court finally decide, the federal questions which Appellant has raised in the Jurisdictional Statement?

2. Does the decision of the Minnesota Supreme Court rest upon adequate and independent state grounds?

3. Is there a substantial question as to the validity of Minn. Stats. § 2.724, Subd. 2 (1974), as applied in this case, under either the due process clause or the equal protection clause of the Fourteenth Amendment to the United States Constitution?

COUNTER-STATEMENT OF THE CASE

This is a motion to dismiss an appeal from a judgment of the Minnesota Supreme Court reversing a money judgment on behalf of Appellant against Appellees and remanding the case for a new trial.* ___Minn.___, 234 N.W.2d 775 (1975). Appellant's judgment was entered on December 6, 1972 following a jury trial in the Hennepin County District Court of Minnesota. The Minnesota Foundation is a nonprofit corporation organized in 1949 which is separate from but contractually related to Amherst H. Wilder Foundation. The Wilder Foundation had been founded under a special law in 1910. See Chapter 222, Laws of Minnesota (1909). Both are charitable institutions primarily

*Wild v. Rarig,

engaged in providing services to the needy of St. Paul, Minnesota. Appellee Frank M. Rarig was, during all relevant times, the Executive Secretary of the Wilder Foundation and the Minnesota Foundation. Appellant, Dr. John J. Wild, had served as the "Principal Investigator" on a research project funded by a 1962 grant to Minnesota Foundation from the United States Public Health Service. In 1966 Wild sued Appellees on various theories arising from Minnesota Foundation's termination of Wild's employment for, and its sponsorship of, the project on December 31, 1963.

The trial court entered a judgment against Appellees in the amount of $16,277,300, for aggregated tort, contract and punitive damages, a combination of the jury's several special verdicts. A joint Notice of Appeal to the Minnesota Supreme Court was filed by Appellees on February 15, 1973. Thereafter, Wild filed "Affidavits of Prejudice" against all seven justices of the Minnesota Supreme Court, together with three retired justices, and then made a Motion seeking their disqualification and recusation. [See Motion filed March 26, 1973]. This Motion was based upon Wild's allegations of bias on the part of the members of the court against himself and his counsel, as well as upon the claim that all of the justices of the Minnesota Supreme Court were "visitors" of the Wilder Foundation.[1/] The Motion

[1/] The ancient wills creating two of the three charitable trusts ultimately consolidated into the Wilder Foundation contained "requests" by the testators that the persons acting as judges of Minnesota's highest court "exercise frequently visitorial powers" over the administration of the charities. The Articles of

was filed despite the fact that Wild's counsel had previously been advised that all of the justices had elected to excuse themselves from hearing the appeal. [See letter from Clerk dated March 12, 1973].[2] The Motion was denied.

Subsequently, by Order of the Minnesota Supreme Court dated April 10, 1974, and pursuant to the authority of Minn. Const. art. VI., § 2 and Minn. Stats. § 2.724, subd. 2 (1974) [Chapter 18, Laws of Minnesota (1973)], a panel of nine[3] judges of the Minnesota State District

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Incorporation of the Wilder Foundation [executed pursuant to Chap. 222, Laws of Minn. (1909)] make no mention of such request or authorization. There is no evidence that any member of the Minnesota Supreme Court has ever accepted responsibility or acted as a "visitor" of the Wilder Foundation. Under Minnesota law, the state attorney general is specifically charged with the enforcement of public or charitable trusts and with the representation of all beneficiaries of such trusts. See Minn. Stats. § 501.12, Subd. 3 (1974).

[2] James C. Otis, Associate Justice of the Minnesota Supreme Court, had long been a member of the Board of Directors of both foundations and also appeared as a witness at trial; there was never any indication that Justice Otis would take any part in the appellate consideration of the case. Appellant has urged that Justice Otis' mere presence on the court has somehow infected the entire court, and all substitute justices as well, with bias and prejudice.

[3] After the filing of the notice of appeal to the state supreme court, but prior to the appointment of the temporary panel, legislation

Court was appointed to hear and decide the appeal in place of the court's permanent members.[4] A series of motions, pleadings and affidavits of prejudice was filed by Appellant in an attempt to prevent any hearing of the appeal by the temporary panel of the Minnesota Supreme Court. These proceedings included an action in the United States District Court for the District of Minnesota, Fourth Division, in which Appellant sought to obtain, among other things, an order of the federal court enjoining the prosecution or hearing on the appeal to the state supreme court. Wild v. Knutson, Civil No. 4-73-473 (D. Minn. 1973). By order dated December 13, 1973, the late Judge Phillip Neville dismissed the action for failure to state a claim. Wild's motion to vacate this order was denied by Judge Edward Devitt, acting in the absence of Judge Neville. Wild's appeal from the order was summarily dismissed by the Eighth Circuit Court of Appeals.

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increasing the membership of the court from seven to nine justices became effective. See Chapter 726, § 1, Laws of Minnesota (1973). The two newly appointed associate justices, along with the new chief justice who assumed his duties during the same period, joined sua sponte in excusing themselves from consideration of the appeal.

[4] The replacement judges were chosen in the following manner: The Chief Judge (selected by all the judges of his district) from each judicial district of the state, with the exception of the district in which the Appellee charitable foundations are established, was invited to serve. In three cases, the Chief Judge of the district was unable to serve, and the senior judge of that district agreed to

Wild v. Knutson, No. 74-1137 (8th Cir., June 13, 1974).

Wild's various further attempts to prevent a hearing of the appeal by the substitute panel of the Minnesota Supreme Court were each denied and a hearing was finally had. On January 10, 1975, the panel filed its decision reversing the judgment obtained by Appellant in the trial court and remanding the matter for a new trial with directions. Thereafter, Appellant's Petition for Rehearing was denied on July 31, 1975. Wild then filed yet another Motion seeking various forms of relief, including de novo consideration of the appeal by the permanent justices of the Minnesota Supreme Court and an award of $520,000 in costs and attorneys' fees as a prerequisite to any retrial of the lawsuit. [See Motion filed August 15, 1975]. By order of the permanent Minnesota Supreme Court dated October 16, 1975, this Motion was denied and the matter was remanded to the trial court. This appeal followed.

I.

THE RECORD FAILS TO ESTABLISH THAT APPELLANT PROPERLY PRESENTED OR THAT THE MINNESOTA SUPREME COURT DECIDED ANY OF THE FEDERAL QUESTIONS SOUGHT TO BE PRESENTED FOR REVIEW.

In order for the jurisdiction of this Court to be established in the instant case, it must affirmatively appear from the record that the federal questions alleged by Appellant to

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serve. These nine district judges were then appointed pro tempore justices of the Minnesota Supreme Court by its new chief justice, Robert J. Sheran.

require review were presented to the Minnesota Supreme Court and that these questions were actually decided by that court. Honeyman v. Hanan, 300 U.S. 14, 18 (1937); Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934). It is Appellant's burden to establish that this Court has jurisdiction of the appeal. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942). Where both the proper presentation of a federal question and a decision of that question by the state court do not clearly appear on the record, the appellate jurisdiction of this Court fails. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Appellant's Jurisdictional Statement fails to demonstrate the jurisdiction of this Court. A review of the record made before the Minnesota Supreme Court demonstrates that Appellant did not present that court with the federal questions listed in his Jurisdictional Statement. As a consequence, the state court did not finally decide those questions nor was the resolution of these claimed federal questions necessary to the Minnesota court's decisions and action. Appellant has listed twelve compound questions, containing no less than twenty-one separate parts, which he claims are raised by the record below. The frivolous nature of this claim is amply evident not only from the record, but also from Appellant's failure to express the great bulk of these questions in the terms and circumstances of this case, as required by Rule 15(1)(c) of this Court's rules.[5/] The only questions which Appellant even arguably attempted to raise below are contained in Questions 1 and 2 [Juris. Stmt., pp. 7-8] and only these will be treated in this Motion.

[5/] See, e.g., Question 9 [Juris. Stmt., p. 11].

Initially Appellant relies upon his Motion to Dismiss the appeal below, filed on August 28, 1973, to establish proper presentation of his federal questions. This reliance is misplaced in view of the fact that this Motion was expressly made "without prejudice" to Appellant's claimed (but unspecified) rights under the federal and state constitutions. [Motion, p. 5]. The Motion and Memorandum in support thereof did not refer specifically to any provisions of the federal Constitution, but rather presented the general law questions of "estoppel" and "waiver" and cited Minnesota precedent on these issues.[6/] In addition, Appellant made broad assertions concerning denial of "due process" and "constitutional rights" without differentiating between the state and federal constitutions or citing relevant provisions of either. It is well established that a federal question is not properly

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6/ In the context of the subject Motion, the issues of both estoppel and waiver were matters of state law. See Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292 (3d Cir. 1973); 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System, 432 F.2d 64 (5th Cir. 1970), cert. denied 401 U.S. 955 (1971); Phillips v. Glenn Falls Ins. Co., 288 F.Supp. 151, 155 (D. W. Va. 1968), aff'd 409 F.2d 206 (4th Cir. 1969); Glenn v. State Farm Mut. Auto. Ins. Co., 341 F.2d 5 (10th Cir. 1965).

presented by allegations of general unconstitutionality and denial of due process and that, in the absence of any greater specification, it will be assumed that such references are to the state constitution involved. Herndon v. Georgia, 295 U.S. 441 (1935); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, at 67-68 (1928); Bowe v. Scott, 233 U.S. 658 (1914). As stated in Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, (1897),

> [T]he jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

It certainly cannot be said that the vague averments of Appellant's dismissal Motion were sufficient to support the instant appeal.

Appellant next turns to his Motion below for, inter alia, leave to subject members of the substitute Supreme Court to interrogation, which was filed on April 22, 1974. By that Motion, Appellant requested various alternative forms of relief, including disclosure of the method by which the substitute judges had been appointed, but sought primarily the opportunity to conduct a voir dire examination prior to the hearing of the appeal. In the third portion of his Motion, Appellant moved that "further or alternatively to the foregoing," the temporary Supreme Court declare Chapter 18, Laws of Minnesota (1973) unconstitutional as applied to his case. In connection with this request, Appellant cited a prior Minnesota Supreme Court decision, Article

1, Section 8 of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution, asserting that these authorities "prohibit any disqualified judge . . . from acting in any way either privately or at personal discretion in the cause wherein he is disqualified . . . ." [Motion, p. 2]. No further argument or citation of authority was provided.

It is not at all clear that a federal question was raised by this alternative request for relief. What is clear, however, is that no decision of any federal question was thereby required and that the substitute court did not consider itself confronted with a question as to the federal Constitutional validity of Minn. Stats. § 2.724. As the order and memorandum filed by that court on May 6, 1974 makes evident, the judges considered themselves bound only to respond to Wild's factual allegations concerning their own judicial bias or interest and to his questions concerning the manner in which they had been appointed. In this regard, it is important to note that the third "alternative" portion of the Motion was made without any supporting argument or citation of authority. As a result, under Rule 128.01(4), Minn. R. Civ. App. P., this point was waived by Appellant. See Schoepke v. Alexander Smith & Sons Carpet Co., 290 Minn. 518, 187 N.W.2d 133 (1971); Lowe v. Patterson, 265 Minn. 42, 120 N.W.2d 313 (1963); Johnson v. Quaal, 250 Minn. 154, 159, 83 N.W.2d 796, 800 (1957).

The members of the substitute panel invited the permanent judges of the Minnesota Supreme Court to state, for the record, the manner in which the appointments had been made, so as to dispel Appellant's factually baseless claims of "private or discretionary appointment"

by the disqualified justices of the Supreme Court. The permanent judges responded with a Statement by the Court, dated May 8, 1974, in which the system used to select substitute judges was set forth on the record.[7] This memorandum and order, together with the subsequent Statement by the Court, represented the Minnesota Supreme Court's decision of the factual issues of judicial bias and interest asserted by Appellant. In disposing of this Motion, the court did not decide, nor was it required to decide, the federal questions which Appellant claims to have raised. As will be more fully discussed below, this does not constitute a decision by the Minnesota Supreme Court of any federal question, but rather represents an essentially factual determination of a state law issue, and therefore constitutes adequate and independent state grounds for decision of the Motion. For all that appears in the record, the substitute Supreme Court proceeded without any substantial claim that the decision of any federal question was either desired or necessary.

In addition to the foregoing, Appellant also relies upon his alternative request in the same Motion below which asked that the members of the substitute panel declare "null and void" Chapter 18, Laws of Minnesota (1973). A review of Appellant's moving papers discloses that no federal question or federal grounds were offered in connection with this request. Appellant next

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7/ It was subsequently stated for the record that the system had been implemented "by Robert J. Sheran as Chief Justice of the said Supreme Court . . . ." See Order dated March 21, 1975.

turns to the Affidavit of Prejudice filed on May 8, 1974 against all nine substitute members of the Minnesota Supreme Court. Again, an examination of this document discloses that no federal question was properly raised. Rather, Appellant continued his vague allusions to civil rights and constitutional rights under both state and federal constitutions. While Appellant also directs this Court's attention to his second Motion to Dismiss, filed on May 15, 1974, he apparently does not contend that the federal questions which he now seeks to present were put to the Minnesota Supreme Court at that time, for the Motion dealt specifically with Appellant's theories that Appellees herein had waived their right to any appeal to the Minnesota Supreme Court and that briefs filed on their behalf before that court were defective. Moreover, Appellant expressly stated in his Motion that it was being made without constituting "a waiver" of his "constitutional objections" to the hearing of the appeal by the substitute panel. [Motion, p. 4]. Obviously then, Appellant did not intend by this Motion to present the question of any federal Constitutional infirmity in the proceedings.

Appellant finally cites his Petition for Rehearing before the Minnesota Supreme Court. Under Rule 140, Minn. R. Civ. App. P., the Petition for Rehearing is to be used to set forth "any controlling statute, decision or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived." The Rule is a codification of the decision of the Minnesota Supreme Court in Derby v. Gallup, 5 Minn. 85 (1860), in which the court held that rehearing will be granted only upon a showing that manifest error has been committed or that the case was not fully argued on appeal. 3 Hetland & Adamson,

Minnesota Practice, pp. 604-605 (1970). Far from asserting any new questions concerning the federal Constitutional validity of the subject statute, Appellant merely renewed his conclusory allegations of judicial bias, prejudice and misconduct by the substitute panel as set forth in his earlier motions. In his rehearing Petition, Appellant took the position that "a review of the sordid details of the deprivation of the respondent's [Appellant's] civil rights by those acting for and on behalf of the influential defendants would be redundant." [Petition for Rehearing, p. 63 (emphasis added)]. Appellant's inclusion in his Petition of a lengthy syllabus of judicial quotations concerning the meaning and history of constitutional due process of law does nothing to support his claim that the questions presented in his Jurisdictional Statement here were properly presented to the court below by his Petition for Rehearing. The order denying Appellant's Petition for Rehearing does not demonstrate the disposition of any federal question, but rather reflects Appellant's failure to show grounds for Rehearing.

In summary, a reading of the record does not disclose that any federal question was properly put to the Minnesota Supreme Court and most clearly establishes that none was decided or necessarily disposed of by that court's action. This appeal should therefore be dismissed.

II.

THE DECISION OF THE MINNESOTA SUPREME COURT RESTS UPON ADEQUATE AND INDEPENDENT NON-FEDERAL GROUNDS.

The "decision" of the Minnesota Supreme Court of which Appellant seeks review by this Court was the temporary panel's action in hearing and deciding the appeal of the trial court judgment

below. All of the various affidavits, motions and petitions filed by Appellant were designed to prevent a hearing of the appeal and had as their theme Wild's contention that the members of the panel were disqualified because of bias, prejudice and interest and because of the allegedly prejudicial circumstances of their appointment.[8] In denying these motions, the panel determined that Appellant had failed to establish any grounds for disqualification of its members and then clarified the method of their appointment to dispel Appellant's factually baseless assertions. [See Order filed May 6, 1974 and Statement by the Court filed May 8, 1974]. In so acting, all that was decided was the question of the sufficiency of Appellant's allegations and proof of judicial bias or interest. No decision of any federal question was made, nor was any required.

Rule 63.03, Minn. R. Civ. P., providing for the disqualification of trial court judges upon the mere filing of an affidavit of prejudice, was not applicable to the supreme court justices in the instant case. Therefore, in seeking to disqualify the entire membership of the temporary panel, Wild assumed the burden of making an affirmative evidentiary showing of prejudice. See Prior Lake State Bank v. Mahoney, 298 Minn. 567, 216 N.W.2d 681 (1974); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W. 2d 762 (1956). Thus, Appellant's conclusory factual allegations

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[8] Perhaps the best précis of the arguments repeated by Appellant throughout the proceedings below appears in the memorandum opinion of Judge Neville in Wild v. Knutson, Civil No. 4-73-473 (D. Minn., filed Dec. 13, 1973), appeal dismissed, No. 74-1137 (8th Cir., filed June 13, 1974).

of bias were not sufficient. Moreover, his allegations of "interest" on the part of certain panel members because of alleged prior connection with the St. Paul Companies was legally insufficient to establish grounds for disqualification.[9] Finally, the Statement by the Court concerning the appointment of the substitutes conclusively rebutted Appellant's baseless accusations of manipulation and discretionary selection by disqualified judges. As that Statement makes clear, the "selections" were made pursuant to a neutral system resulting in the participation of the chief judge (or the next most senior judge available) from each of the state's judicial districts except the district within which the Appellee charitable foundations are established. These judges were then appointed by order of the

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[9] See Wickoff v. James, 159 Cal.2d 664, 324 P.2d 661 (1958); State v. City of Mobile, 248 Ala. 467, 28 So.2d 177 (1946); Keeffe v. Third National Bank, 177 N.Y. 305, 69 N.E. 593 (1904).

> The disqualification of a judge as counsel or former counsel to a party is limited to parties with whom he has been in an attorney and client relationship and to cases with respect to which he has acted as counsel. [Emphasis added.]

48 C.J.S. Judges § 83(2), p. 1065 (1947). Only such interests as are direct, immediate and certain will disqualify a judge. State Bar Ass'n v. Divorce Educ. Associates, ___ Minn. ___, 219 N.W.2d 920, cert. denied, 419 U.S. 1023 (1974); Goodman v. Wis. Elec. Power Co., 248 Wis. 52, 20 N.W.2d 553, 162 A.L.R. 649 (1945); Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 226 P. 604, 33 A.L.R. 1316 (1924).

Chief Justice. [See Order filed March 21, 1975].10/ Appellant failed to show any grounds, factual or legal, for the relief requested, and there can be no question as to the propriety under state law of the panel's refusal to disqualify itself. Clearly then, the decision of the Minnesota Supreme Court rejecting Appellant's demands for disqualification rested upon fully adequate state grounds.

It is a rule of long standing that the Court will not review the judgment of a state court which is based upon adequate and independent nonfederal grounds. Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45 (1908). Indeed, in the absence of an opinion by the state court, if it appears that the judgment might have rested upon nonfederal grounds, this Court will decline jurisdiction. Stembridge v. Georgia, 343 U.S. 541, 547 (1952); Woods v. Nierstheimer, 328 U.S. 211 (1946). Any ambiguity as to the presence of adequate state grounds supporting the judgment will be resolved

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See 46 Am. Jur.2d Judges § 99, p. 163 (1969). The interest must be one which is presently in existence. Id., § 100, p. 164.

10/ Under Minnesota law, the selection of substitute judges has long been recognized as a proper judicial function. See State ex rel. Thompson v. Day, 200 Minn. 77, 273 N.W. 684 (1937); State ex rel. Decker v. Montague, 195 Minn. 278, 262 N.W. 684 (1935).

by refusing jurisdiction. See Black v. Cutter Laboratories, 351 U.S. 292 (1956); Durley v. Mayo, 351 U.S. 277 (1956); Phyle v. Duffy, 334 U.S. 431 (1948). In the instant case, the presence of nonfederal grounds which independently support the denial of Appellant's requests for disqualification is clear. Appellant failed to make the factual showing required to obtain such relief and, at least in the case of his claims of "interest," even his unfounded factual allegations were legally insufficient.

It is likewise evident that the decision of the Minnesota Supreme Court in the instant case was, in essence, the resolution of a question of fact. As noted above, Appellant was required to make an affirmative evidentiary showing of bias or prejudice in order to disqualify the members of the temporary panel. Appellant failed to present evidence of any kind to establish his broad allegations. Under Minnesota law, the question of judicial bias, prejudice or interest is an issue of fact. See Payne v. Lee, 222 Minn. 269, 271, 24 N.W.2d 259, 262 (1946); State ex rel. Decker v. Montague, supra at n. 11; cf. Friedman v. Goffstein, 182 Minn. 396, 234 N.W. 596 (1931). The Order of May 6, 1974, its accompanying memorandum, and the Statement by the Court represent a decision against Appellant on the factual questions of judicial bias and prejudice which he sought to raise. This Court does not ordinarily review findings of fact made by state courts. Fry Roofing Co. v. Wood, 344 U.S. 157 (1952); Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294, reh. denied, 312 U.S. 715 (1941); Grayson v. Harris, 267 U.S. 352, 358 (1925); see also Note, Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 Stan. L. Rev. 328, n. 1 (1962). No basis for a departure from this rule

is present in the instant case. Because the decision below rests upon adequate grounds, and because it represents the resolution of a question of fact, this appeal should be dismissed.

III.

THERE IS NO SUBSTANTIAL QUESTION AS TO THE VALIDITY OF MINN. STATS. § 2.724, SUBD. 2 (1974) AS APPLIED IN THIS CASE UNDER EITHER THE DUE PROCESS CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court has consistently held that jurisdiction under 28 U.S.C. § 1257(2) cannot be maintained if an appellant fails to present a substantial federal question. See, e.g., Roe v. Kansas, 278 U.S. 191, 192 (1929); Zucht v. King, 260 U.S. 174, 175 (1922); Sugarman v. United States, 249 U.S. 182, 184 (1919). In the instant case, the federal claims which Appellant purports to present are patently unsubstantial, and therefore jurisdiction under 28 U.SC. § 1257(2) is lacking.

Minn. Stats. § 2.724, Subd. 2 (1974), provides, in pertinent part:

> Any number of justices may disqualify themselves from hearing and considering a case, in which event the Supreme Court may assign temporarily a retired justice of the Supreme Court or a district judge to hear and consider the case in place of each disqualified justice.[11/]

11/ Minn. Const. art. VI, § 2, as amended in 1972, provides that district court judges may be assigned to act as temporary justices of the supreme court "as provided by law." Minn. Stats. § 2.724, Subd. 2 (1974) simply implements this constitutional provision.

Appellant rests upon the bald assertion that the application of this provision in the subject action constituted a denial of due process and equal protection, without providing any supporting analysis or citing a single relevant case. Appellant merely lists several cases which allegedly provide the basis for jurisdiction [Juris. Stmt., p. 5], but does not explain or illustrate their applicability. In fact, none of these cases are related in any way to the issue of the appointment of substitutes by disqualified judges.

Because Appellant does not explain precisely in what manner the application of this statute was allegedly unconstitutional, it is difficult to respond to his conclusory contention. However, assuming that his argument relates to the manner in which the substitute justices were selected, such a claim is without substance. Indeed, the method of selecting replacement justices employed in the instant case is remarkably similar to methods used by other state supreme courts in those rare instances when each justice found it necessary to recuse himself. In State Board of Law Examiners v. Spriggs, 61 Wyo. 70, 155 P.2d 285, cert. denied, 325 U.S. 886 (1945), a court composed of three district court judges recommended to the state supreme court that respondent Spriggs be disbarred. The basis for this recommendation was that Spriggs had made

certain false, contemptuous and scandalous charges against the state supreme court when he was a candidate for the office of justice of that court, one of the incumbent members of the court being his opponent.

All three supreme court justices declined to hear the matter on appeal and called in three other district court judges to hear the matter.[12] This was done pursuant to provisions of the Wyoming Constitution empowering the presiding justice to "call" district judges to serve as temporary members of the supreme court. Wyo. Const. art. V, § 6.

The supreme court, composed of the temporary justices, rejected Spriggs' objection to their assumption and exercise of jurisdiction:

> This is the first time in the history of this court that it has become necessary to call in three district judges to fill the places of the three supreme court justices . . . .
>
> We believe that this constitutional provision contemplates the calling in of a district judge to take the place of each justice who shall for any reason be unable to sit. Thus if one, two or three justices for any reason think they should not sit in a case, each place is filled by a district judge who is called in by the Chief Justice.

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[12] There were seven district court judges in the state. The three that had heard the matter in the district court were disqualified, one other also disqualified himself, and the remaining three heard and decided the matter on appeal. 61 Wyo. at 76, 155 P.2d at 281.

> The constitutional provision was adopted to expedite the disposition of cases in this court, and also to provide a full panel to hear and determine litigation if any one or more justices were ill or for any reason felt he or they should not sit. The objection to the jurisdiction of this court as composed is overruled.

Id. at 76-77, 155 P.2d at 287.[13]

A similar procedure for selecting replacement justices was employed in Kekoa v. Supreme Court, 53 Haw. 174, 488 P.2d 1406 (1971). In that case, each supreme court justice recused himself from hearing the case. The issue concerned the proper method of appointing replacements. The appellants requested that this be done by drawing lots. The court rejected this proposal, finding that the state constitution called for the appointments to be made by the chief justice himself.

In the later decision on the merits, Kekoa v. Supreme Court, 55 Haw. 104, 516 P.2d 1239, cert. denied, 417 U.S. 930 (1973), the reasons for the recusal of each justice were stated. The justices of the state supreme court, acting pursuant to the provisions of a will, had appointed the trustee of an estate. A civil suit

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[13] The Spriggs case also indicates that, even absent Minn. Stats. § 2.724, Subd. 2 (1974), the Minnesota Supreme Court had the full power and duty to appoint substitute justices to sit in its place. This conclusion also follows from the rule that, in no event, shall judicial bias be allowed to destroy the only

was brought challenging that appointment, and the trial court dismissed the action. Plaintiffs appealed from the dismissal and brought a motion seeking the disqualification of the entire supreme court. All of the justices recused themselves. In deciding the case, the replacement judges found that their appointment had been entirely proper, stating, "We take judicial notice of the fact that the provisions of Article V, § 2 [Hawaii Constitution] are frequently implemented, precisely in order to avoid any appearance of impropriety." Id. at 114, 516 P.2d at 1246.

The above cases, which closely parallel the instant action in the reasons for disqualification of the regular justices and the constitutional provisions for appointment of temporary justices, indicate that when each justice of a state supreme court finds it appropriate to recuse or disqualify himself, it is entirely proper for the supreme court itself to appoint temporary justices to sit in its place. In fact, rather than constituting a denial of due process or equal protection, such methods are employed to avoid even the "appearance of impropriety" Kekoa, supra, 55 Haw. at 114, 516 P.2d at 1246, and to "provide a full panel to hear and determine litigation," Spriggs, supra, 61 Wyo. at 76-77, 155 P.2d at 287. The systematic method employed in the instant case, chosen to obtain a representative panel of experienced judges, is consistent with notions of due process, and was unquestionably correct as a matter of statutory, as well as state and federal constitutional law.

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tribunal in which relief can be had and thereby prevent a determination of the proceedings. See 46 Am. Jur.2d Judges, § 89 (1969) and cases cited therein. The rule of necessity has been specifically adopted in Minnesota. State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954).

In addition to being consistent with procedures adopted by other state supreme courts in similar situations, the method employed in selecting temporary justices in this case is unquestionably consistent with prior Minnesota decisions and practices. In In re Daly, 294 Minn. 351, 200 N.W.2d 913, cert. denied sub nom. Daly v. McCarthy, 409 U.S. 1041 (1972), three disbarred attorneys and a non-lawyer were declared ineligible to be candidates for judicial office in an original proceeding before the Minnesota Supreme Court. Associate Justices of the Supreme Court C. Donald Peterson and Fallon Kelly, whose offices were being sought by two of the disbarred attorneys, took no part in the consideration of the case. A retired associate justice of the court and a district court judge were appointed by the court to replace the disqualified judges in hearing the case. Id. at 363, 200 N.W.2d at 920.

In Peterson v. Knutson, Minn. No. 45333, Finance and Commerce, August 12, 1975, at 6, col. 1, one of the three disbarred attorneys in the Daly case, supra, brought suit against the justices of the Minnesota Supreme Court for damages of $750,000, claiming to have been injured by the participation of any permanent justices in the decision of In re Daly, supra. The plaintiff also named Associate Justices Peterson and Kelly as defendants, alleging that they had wrongfully influenced the decision.

The trial court granted summary judgment for all defendants, and plaintiff appealed to the Minnesota Supreme Court. The justices who were defendants recused themselves, and district judges were selected to hear and decide the case as justices of the supreme court by appointment pursuant to Minn. Const. art. VI, § 2 and Minn. Stats. § 2.724, Subd. 2 (1974).

Other Minnesota cases have indicated that a disqualified judge may perform those functions, including the appointing of a substitute judge, which are necessary to secure determination of the case. In State ex rel. Thompson v. Day, 200 Minn. 77, 273 N.W. 684 (1937), the court noted:

> The matter of selecting the substitute judge pertains to the everyday, routine management of the courts and therefore is a judicial function. Hence, it cannot be delegated to the executive department.

Id. at 82, 273 N.W. at 686.

Similarly, in State ex rel. Decker v. Montague, 195 Minn. 278, 286, 262 N.W. 684, 688 (1935), the court noted that appointing a substitute judge when the regular judge is disqualified is generally a judicial duty. A final example of such reasoning is found in Minnesota State Bar Ass'n v. Divorce Ed. Associates, ___ Minn. ____, 219 N.W.2d 920 cert. denied, 419 U.S. 1023 (1974), when the court quoted with approval the following language from 46 Am. Jur.2d Judges § 230 (1969):

> Thus, the disqualification of a judge to hear and determine a cause does not prevent him from making orders that are purely formal in character. . . . He may make such formal orders as are necessary to the maturing or the progress of the cause, or to bring the suit to a hearing and determination before a qualified judge, or another court having the jurisdiction . . . .

___Minn. ___, 219 N.W.2d at 921 (emphasis supplied by court).

Appellant's heavy reliance on Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946) [Juris. Stmt, p. 5], is misplaced, for the subject matter of that case is related to the circumstances under which a judge should disqualify himself, and does not specifically discuss the appropriate method of selecting a substitute judge after disqualification. In fact, the Payne court quoted with approval Minn. Stats. § 525.051, which then provided in pertinent part:

> When the disqualification . . . of the resident judge exists, . . . any other judge may act upon the request of the resident judge . . . .

222 Minn. at 272, 24 N.W.2d at 262 [emphasis added]. The court thus recognized that the appointment of a substitute judge by the disqualified judge was entirely proper.

Many cases in various other jurisdictions have similarly held that the appointment of a temporary judge by the disqualified judge does not constitute a denial of due process or equal protection. In State v. Day, 506 S.W.2d 497 (Mo. App. 1974), the trial judge in a criminal matter disqualified himself, and appointed a substitute judge to sit temporarily in his place. The defendant argued that such a procedure was a denial of due process under the Missouri and United States Constitutions, claiming that "[I]f a judge who has been disqualified is permitted to appoint his successor, the bias of the judge carries over to his successor." Id. at 499. The court summarily rejected this contention, stating that "The propriety of this procedure has been consistently approved, and it was proper

here." Id. at 499.[14] The claim made by Appellant in the instant case, that the alleged bias of the justices of the Minnesota Supreme Court would somehow carry over to the replacements, is equally without merit, and does not pose a substantial federal question.

In Stringer v. United States, 233 F.2d 947 (9th Cir. 1956), the court similarly recognized the power of a disqualified judge to appoint a substitute:

> [O]nce having disqualified himself for cause, on his own motion, it was incurable error for the district judge to resume full control and try the case . . . . This is not to suggest that a trial judge after disqualifying himself cannot with propriety carry on the mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication.

Id. at 948. Several other jurisdictions have recognized this principle, and have upheld the authority of a disqualified judge to appoint his replacement. See, e.g., Williams v. Widows and Orphans Home, 140 Mont. 259, 373 P.2d 948 (1962); Fuller v. Gibbs, 122 Mont. 177, 199 P.2d 851 (1948); Pincus v. Pincus' Estate, 95 Mont. 375, 26 P.2d 986 (1933); Hordyke v. Farley, 94 Ariz.

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[14] In Rowland v. State, 213 Ark. 780, 798-800, 213 S.W.2d 370, 381-82 (1948), cert. denied sub nom., Rowland v. Arkansas, 336 U.S. 918, reh. denied, 336 U.S. 941 (1949), the court similarly indicated that where a disqualified judge appointed his replacement, the alleged bias of the disqualified judge did not attach to his appointee.

189, 382 P.2d 668 (1963); Garland v. State, 110 Ga. App. 756, 140 S.E.2d 46 (1964); Hooks v. State, 207 So.2d 459 (Fla. 1968); Bloodworth v. State, 160 Ga. 197, 127 S.E. 458 (1925); Ex Parte Burch, 168 Cal. 18, 141 P. 813 (1914); Winn v. Eatherly, 187 Miss. 159, 192 So. 431 (1939). Other courts have explicitly recognized the affirmative duty of a disqualified judge to appoint his replacement. See, e.g., Allen v. State, 102 Ga. 619, 626-27, 29 S.E. 470, 473 (1897); Dupriest v. Reese, 104 Ga. App. 805, 806, 123 S.E.2d 161, 162 (1961).

Against the weight of this authority, Appellant does not provide a single case which in any way suggests that the method of selecting the substitute justices in the instant action was not proper, and nothing has been offered which even indicates that there has been a denial of due process, equal protection or any other federally protected Constitutional right.

The fact that Appellant has failed to present a substantial federal question has previously been recognized by a federal court. Wild v. Knutson, Civil No. 4-73-473 (D. Minn., December 13, 1973). In that action, Appellant sought to convene a three-judge federal court to consider the constitutionality of the state statute and to enjoin the appeal from the trial court judgment to the state supreme court. The late Judge Phillip Neville denied this relief, and dismissed the action for failure to state a claim. In the accompanying memorandum, he characterized Appellant's claims as follows:

> He alleges that the Minnesota statute permitting appointment of replacements is unconstitutional, at least as applied to this case, and that he is denied due process in that

he cannot and will not, under any circumstances he claims, receive a fair trial on appeal . . . .

Coming first to the constitutionality of the statute re appointing replacements which seems to this court to be the only possible federal question that could be raised. Facially the statute is clearly valid. It is a procedural direction or authorization from the legislature to the court and cannot be said to suffer from overbroadness, or discriminatory provisions, or lacking due process, or violating some specific federal constitutional provisions, some of the conventional attacks that normally are leveled at state statutes. On the question of whether this statute, valid on its face, is somehow unconstitutional as applied to Dr. Wild's case, the obvious thing that can be said is that he hasn't yet been hurt, if at all. For all that this court knows his state court judgment may be affirmed by the replacement judges. He seems to doubt this however and to urge that the statute permitting appointment of replacements is inherently evil, apparently on the theory that the district judges to be appointed - whomsoever they may be - will in some way owe a fealty to the Supreme Court or will be persuaded or brainwashed to make such decision as the Supreme Court may direct and thus will be prejudiced against him. Following this premise in effect he asks this court to hold that all Minnesota State District Judges in excess of 70 in number, are

prejudiced and biased against his cause and that any of them selected cannot and would not be fair and impartial. Such a premise is ridiculous. In reality this court need not consider whether the challenge to the statute is unconstitutionality per se or merely as applied. In either event the challenge has no merit and does not warrant the convening of a three-judge federal court.

[Memorandum, pp. 3-4]. Appellant's appeal from Judge Neville's opinion was summarily dismissed as "legally frivolous" and "entirely without merit" by the Eighth Circuit Court of Appeals. Wild v. Knutson, No. 74-1137 (8th Cir., June 13, 1974).

In denying Appellant's motions, Judge Neville also relied, in part, on the fact that the challenge to the application of the statute was then premature. However, with the exception of additional conclusory allegations of bias and prejudice, the record remains completely devoid of any evidence to suggest that Appellant's constitutional rights were eventually impinged in the replacement process. Therefore, Judge Neville's conclusion that Wild's challenge is "conclusory," without merit and unsubstantial [Memorandum, pp. 4-5.] remains accurate, and provides reasoned authority for the view that the jurisdiction of this Court should not be exercised.

CONCLUSION

For all of the reasons stated above, Appellees respectfully urge this Court to

dismiss this appeal.

Respectfully submitted,

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